No. 88-1387

Supreme Court, U.S.
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FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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WILLIAM H. KINSEY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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10 pp

## QUESTION PRESENTED

Where the statute of limitations is asserted as a defense in a federal income tax case, the ultimate issue is timeliness of the deficiency notice. In the instant case, timeliness is dependent upon Form 872-A, an open-ended extension agreement widely used by the Service.

Should there be subjected to judicial review the Tax Court proposition that Form 872-A keeps open the extension of time for issuing a deficiency notice until the taxpayer executes and delivers to the Service a Form 872-T, and the Tax Court will no longer consider collateral matters such as whether the elapse of time was unreasonable, or whether the purpose sought by the Service in obtaining the extension has been achieved?

## THE PARTIES

In the courts below, the Estate of Irene S. Kinsey, deceased, William H. Kinsey, Executor, was named in the caption. The estate had no interest in the proceedings and is eliminated from the caption here. In 1977, the tax year at issue, identical deficiency notices were sent to William H. Kinsey and to the estate. Lack of uniformity in use of the plural and singular for deficiency notices, petitioners, and taxpayers should be disregarded.

William H. Kinsey acting pro se and as counsel of record became a member of the Supreme Court Bar when, as attorney for respondent Clay Brown, he appeared before this Court and argued the case of Commission v. Clay Brown, 380 U.S. 563 (1965).

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 859 F.2d 1361 (typed copy is Appendix A, App-1a - 21a infra, and typed copy of the Court's denial of Petition for Rehearing is

Appendix B, App-22b, infra.) The memorandum opinion of the Tax Court is reported at 53 TCM 152 (1987), CHH Tax Court Memorandum Decisions 1987-92, (typed copy is Appendix C, App-23c - 38c, infra).

## JURISDICTION

The opinion below was decided October 19, 1988. Rehearing was sought by a timely filed Petition on November 1, 1988. The order of the Court of Appeals denying the petition for rehearing was entered (filed) on November 18, 1988. The memorandum opinion of the Tax Court was filed on February 17, 1987, and the Tax Court decision was entered on March 23, 1987 (typed copy is Appendix D, p. 40d.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTES

### Statutory Scheme for Federal Income Tax Deficiencies

(Section references are to the Internal Revenue Code)

Under the statutory scheme provided by Congress for increasing the income tax liability of a taxpayer over that reported in a filed return, everything centers on the deficiency notice. The dominating essentiality of a deficiency notice is primarily attributable to § 6213(a) which prohibits assessments of an income tax deficiency and any collection efforts unless and until the deficiency has been asserted in a deficiency notice complying with § 6212(a). The prohibition continues until expiration of the 90 days permitted a taxpayer to file a petition with the Tax Court for redetermination of the asserted deficiency, and until the decision of the

Tax Court becomes final if a petition is filed.

The "General rule" in subsection (a) of statute of limitations § 6501 requires that income taxes be assessed within 3 years after the return was filed. Subsection (c) of § 6501 provides certain exceptions, including paragraph (4) entitled Extension by agreement. This is the statutory authority for extension agreements such as Forms 872 and 872-A.

To keep the statute of limitations from expiring during the time that the § 6213(a) prohibition is in effect, § 6503(a)(1) suspends the running of the period of limitations during the prohibition and for 60 days thereafter. The "for 60 days thereafter" gives the Service ample time to "assess" the dollar amount of the deficiency asserted in the deficiency notice if no petition is filed

with the Tax Court, or the dollar amount that emerges from the Tax Court proceeding if a petition is filed.

Statute of limitations § 6501(a), "Extension by agreement" subsection (c)(4), and the extension agreements themselves (Form 872 and Form 872-A) all speak in terms of "assess" with no mention of, or even reference to, deficiency notices. Nonetheless, issue a deficiency notice, not assess, is what the Service needs to do within the period of limitations, or extension. Form 872 extends the time for issuing a deficiency notice to a specified date. Extension of time to issue a deficiency notice under Form 872-A is open-ended.

## STATEMENT OF THE CASE

IRS Publication 556 entitled "Examination of Returns, Appeal Rights, and Claims for Refund" contains a full page diagram showing emblems for progressive steps from "Examination of income tax return" to "U.S. Supreme Court". The first tier ending with the emblem for "Notice of Deficiency" depicts the area of operation for extension agreements such as Form 872 and Form 872-A, and was duplicated at appropriate points in petitioner's lower court briefs.

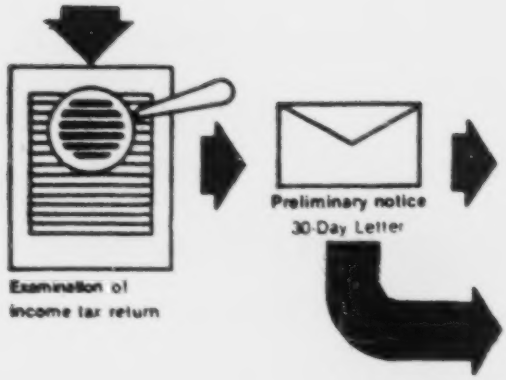
The Court of Appeals, in paragraphs under the heading FACTUAL BACKGROUND, recounts events in sequential order that lends itself to being identified with the progressive stages depicted in the first tier of the Publication 556 diagram. The diagram is duplicated as Appendix "E"

App-41, infra, and segments are included in the text of this petition where appropriate.

The below quoted paragraph from the Court of Appeals FACTUAL BACKGROUND recounts the Service's first requested for execution of an extension agreement.

> "On October 4, 1980, during the time their 1978 return was being audited, the taxpayers were informed by the Service that Beech Mountain was under examination and that the investigation could affect their 1977 return. The taxpayers were asked to execute consent forms extending the statute of limitations for assessment of 1977 taxes. In March, 1981, the taxpayers and the Service executed a Form 872, Consent to Extend the Time to Assess Tax ("Form 872"), which extended until April 15, 1982 the period during which the Service could assess federal income tax due on their 1977 return." [App-4a]

In March, 1981, when the taxpayers and the Service executed Form 872, the status of matters fell under the first emblem of the diagram since examination of the Beech Mountain returns was in progress:




What would have happened if the taxpayers had remained silent and not responded to the Service's request for execution of Form 872, there being less than 60 days remaining before the April 15, 1981 expiration of the statutory period of limitations on assessment of tax? The answer is forthrightly made clear in below quoted Reg. § 601.105(f) of General Procedural Rules (emphasis added):

"(f) Interruption of examination.

The process of field examinations and the course of the administrative procedure described in this section and in the following section may be interrupted in some cases by the imminent expiration of the statutory period of limitations for assessment

> of the tax. To protect the Government's interests in such a case, the district director of internal revenue or other designated officer may be required to dispatch a statutory notice of deficiency (if the case is within jurisdiction of U.S. Tax Court), or take other appropriate action to assess the tax, even though the case may be in examination status. In order to avoid interruption of the established procedure (except in estate tax cases), it is suggested to the taxpayer that he execute an agreement on Form 872 (or such other form as may be prescribed for this purpose). To be effective this agreement must be entered into by the taxpayer and the district director or other appropriate officer concerned prior to the expiration of the time otherwise provided for assessment. Such a consent extends the period for assessment of any deficiency, or any additional or delinquent tax, and extends the period during which the taxpayer may claim a refund or credit to a date 6 months after the agreed time of extension of the assessment period. When appropriate, a consent may be entered into, restricted to certain issues."

If the taxpayers had not granted the extension by signing Form 872, the Service would have issued a deficiency notice even though issuance interrupted further

progression of the established procedure. To reflect such an interruption on the diagram, the emblem for Notice of Deficiency is moved to encroach upon the emblem for "Examination of income tax return," and the emblems for the intervening stages are eliminated. This is not to say that certain aspects of the eliminated intervening stages would not carry over into post-deficiency notice proceedings.

The taxpayers' execution of Form 872 in March, 1981, permitted continuation of the established procedure. However, further assistance from the taxpayers was required when the April 15, 1982 expiration date of the Form 872 became imminent. This is recounted in the below quoted paragraph from the FACTUAL BACKGROUND in the Court of Appeals Opinion:

> In February, 1982, taxpayers and the Service executed a Form 872-A, Special Consent to Extend the Time to Assess Tax ("Form 872-A," also called an "open-ended waiver"), which indefinitely extended the deadline by which the Service could assess any federal income tax due on the 1977 return. The Form 872-A also contained a special, typed-in limitation, as follows: [App-4a - 5a, limitation omitted here]

In February, 1982, the Beech Mountain examination report had been completed under date of September 30, 1981, but the taxpayers' distributive share had not been translated into an examination report and preliminary notice (30 day letter) mailed to the taxpayers. The February 1982 status was either still covered by the emblem for "Examination of income tax return" or was in the preparation stage under the emblem for "Preliminary notice (30-Day Letter)".

As recounted in the below quoted paragraph from FACTUAL BACKGROUND in the Court of Appeals opinion, the "Preliminary

notice" emblem was reached on March 31, 1982, where taxpayers are presented with two alternatives:

> On March 31, 1982, the Service sent the taxpayers a letter ("30-day letter") and a preliminary examination report, which suggested elimination of both the gain and loss reported by the partnership on the Treasury bill straddle and disallowed the deductions claimed for the taxpayers' distributive share of the partnership losses. The letter notified the taxpayers of the examiner's findings, asked them to sign and return an agreement to those findings and informed them that, in the event they did not accept the findings, they had 30 days to request an Appeals Office review. The letter further stated: "If we do not hear from you within 30 days, we will have to process your case on the basis of the adjustments shown in the examination report." The taxpayers did not reply. [App-5a - 6a]

As related in the last sentence of the above quotation, the taxpayers did not reply to the 30-day letter. This accords with the notation in the instruction circle for the lower route which reads: "If you do not respond or the 30-day period

expires, then." From the "then", an arrow points to the emblem for "Notice of Deficiency." Instructional note reflects the below quoted portion of Reg. § 601.105(d)(1)(iv):

> " * * *. The preliminary letter also informs the taxpayer of appeal rights available if he or she disagrees with the proposed determination. If the taxpayer does not respond to the letter within 30 days, a statutory notice of deficiency will be issued. * * *"

The next paragraph under the Court of Appeals FACTUAL BACKGROUND reads (App-6a - 7a):

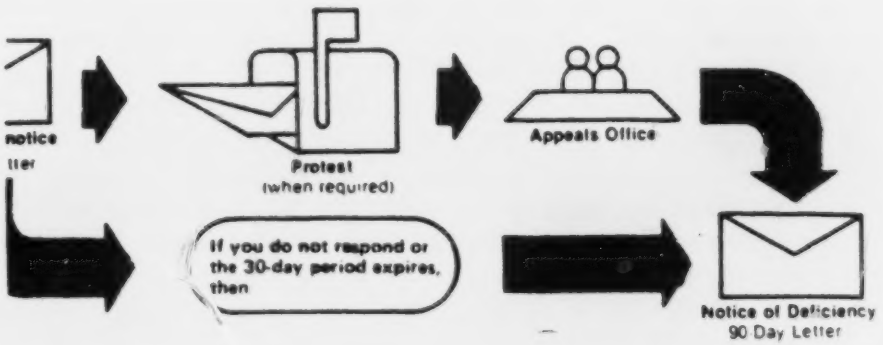
> On May 6, 1982, the Service sent the taxpayers another letter ("10-day letter"), again accompanied by a partial copy of the preliminary examination report. This letter stated, in part: "If we don't hear from you within 10 days, we will have to process your case on the basis of the adjustments shown in the examination report." Again the taxpayers did not reply.

By again not replying, the taxpayers confirmed that the message derived from

failure to reply to the 30-day letter was correct. Whether a taxpayer seeks Appeals Office review prior to issuance of a deficiency notice is optional with the taxpayer, as made clear in the below-quoted sentence of Reg. § 601.106(b):

> " * * * No taxpayer is required to submit a case to Appeals for consideration. Appeals is at the option of the taxpayer."

The taxpayers had elected the direct route to Notice of Deficiency:




When a taxpayer declines to forestall issuance of a deficiency notice by executing an extension agreement at the request of the Service, issuance of a

deficiency notice invoked by the taxpayer's silence involves an element of mutual assent although the Service reacts from a need to protect the Government's interests rather than in accordance with the established procedure.

When things progress under the established procedure to a point where issuance of a deficiency notice no longer interrupts, but accords with, the established procedure, and the taxpayer invokes issuance of a deficiency notice by failure to seek Appeals Office review, there is a pure and simple manifestation of mutual assent that a deficiency notice should issue.

Upon the occurrence of such mutual assent, there is no agreement that the deficiency notice will issue on a specific date, and no such agreement has been claimed by the taxpayers. How long the

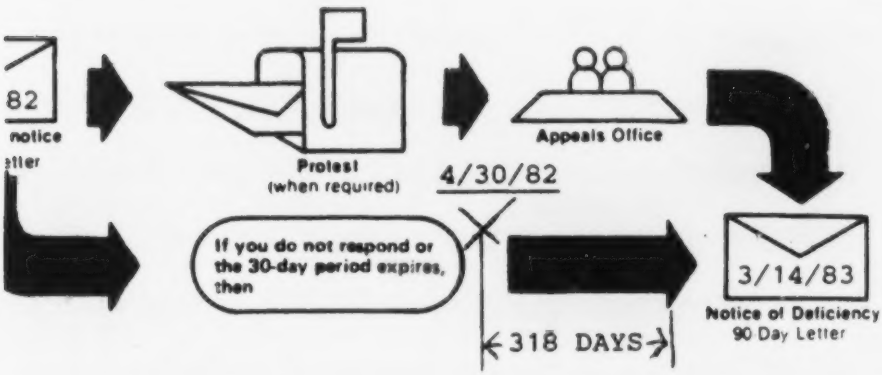
Service has to issue a timely deficiency notice depends upon how much time, if any, remains under the normal statute of limitations, or upon the terms of the extension agreement. An advantage of the extension under Form 872-A over the extension under Form 872 is that, absent unilateral termination by the taxpayer, the Service can count on the Form 872-A extension agreement to provide an uninterrupted progression of events.

The concluding paragraph in the Court of Appeals opinion under the heading FACTUAL BACKGROUND recounts issuance of the deficiency notice on March 14, 1983 (App-7a):

> On March 14, 1983, the Service issued notices of deficiency for 1977 to the taxpayers. In the notices, the Commissioner disallowed deductions for the taxpayers' distributive share of the losses incurred by Beech Mountain on Treasury bill transactions, but included in their gross income their

> distributive share of the gain incurred on the transactions in those years. Taxpayers never sent a Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax ("Form 872-T"), to the Service prior to the issuance of the notices of deficiency.

The concluding portion of the first tier of the Publication 556 diagram is set forth below with an X marking the April 30, 1982 expiration of the 30 days allowed by the preliminary notice for response, and March 14, 1983 for the notice of deficiency:




This diagram in petitioner's lower court briefs was followed by the inquiry: Upon what rationale can it be concluded that the

open-ended extension of time for issuing a deficiency notice goes 318 days beyond the time issuance is called for under the established procedure?

Having executed a Form 872-A that, together with the previously executed Form 872, enabled the established procedure to reach a point where issuance of a deficiency notice is called for, why would a taxpayer mail a Form 872-T to the Service, the sole consequence of which is to call for issuance of a deficiency notice?

## REASONS FOR GRANTING THE WRIT

Neither the Tax Court nor the Court of Appeals addressed the before related queries. The Tax Court avoids addressing petitioner's contentions and arguments with the sentence: "The dispute turns on when the Form 872-A was terminated." App-32c. After so defining the issue, the next

sentence of the Tax Court opinion reads: "A Form 872-A, as clearly indicated in the body of the agreement, terminates on the 90th day following the receipt by respondent of a Form 872-T, the mailing by respondent of a Form 872-T, or the mailing by respondent of a deficiency notice." The Court of Appeals followed the lead of the Tax Court (App-8a).

In the opinion below, the Tax Court did not articulate the foundation for the sentence "The dispute turns on when the Form 872-A was terminated." The basis is made clear in recent Tax Court opinion reviewed by the whole Tax Court, Estate of Camara, 91 T.C. No. 60 (November 23, 1988). Taking solace from the Court of Appeals opinion in the instant case, the Tax Court pronounces in Camara, supra, that henceforth the Tax Court will not entertain the argument that a Form 872-A extension

may end by operation of law after a reasonable time. The extension stays in effect until the taxpayer executes and delivers to the Service a Form 872-T, regardless of time elapsed, and regardless of whether the extension may have permitted a duplication of the situation here presented.

When the holdings below in the instant case are read together with Estate of Camara, supra, it becomes clear that the only matter the Tax Court will consider under a Form 872-A extension is whether the Form 872-A has been terminated in literal compliance with its terms which means a Form 872-T received by the Service from the taxpayer, a Form 872-T mailed by the Service to the taxpayer, or the issuance of a deficiency notice. The Service has no reason to mail a Form 872-T to the taxpayer.

In providing the statutory scheme for increasing the income tax liability of a taxpayer over that reported in a filed return, Congress has inserted a burr under the Service's saddle by making assertion in a deficiency notice a condition precedent to assessment and collection, and by placing a time limit on issuance of a deficiency notice. As reviewed supra, despite being couched in terms of assessment, it is really a deficiency notice that the Service need issue within the time limit, and a deficiency notice need have sufficient specificity to pass muster upon Tax Court review.

The burr is removed from the Service's saddle under the Tax Court's holding for those taxpayers under a Form 872-A extension, and in its place is something with considerably less bite, the

possibility that a taxpayer may mail a Form 872-T.

If other taxpayers are like petitioner, the ability to unilaterally terminate the open-ended extension under Form 872-A is nothing more than what a rational person would expect by way of an escape hatch. To say that the escape hatch becomes the only way out is something else.

Petitioner enjoyed his experience before this Court when dragged there on the prior occasion through a Writ of Certiorari obtained by the Service. Poetic justice would be served if petition could again appear before this Court, but on his own volition.

## CONCLUSION

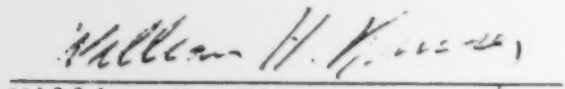
The question of what the many taxpayers who, at the behest of the Service, signed extension Forms 872-A really agreed upon is a matter warranting

early resolution by this Court.

Accordingly, petitioner requests that the Writ of Certiorari be granted.

DATED: February 16, 1989.

Respectfully submitted,



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APPENDIX "A"

William H. KINSEY, and Estate of Irene S. Kinsey, Deceased, William H. Kinsey, Executor, Plaintiffs-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Defendant-Appellee.

No. 87-7237

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT.

Argued and Submitted July 14, 1988.

Decided Oct. 19, 1988.

* * * * *.

William H. Kinsey, Portland, Or., pro se, and for plaintiffs-appellants.

Barbara I. Hodges, Atty., Tax Div., Dept. of Justice, Washington, D.C., for defendant-appellee.

Appeal from the United States Tax Court.

Before GOODWIN, Chief Judge, ALARCON, Circuit Judge, and TASHIMA, District Judge.*

TASHIMA, District Judge:

This appeal from the Tax Court involves income taxes payable for the years 1977 and 1978.[1] Only two issues are presented on appeal: (1) whether the deficiency notices for 1977 were timely issued by the Internal Revenue Service (the "Service" or "I.R.S."; and (2) whether the deficiencies determined in the 1977 notices were within the restriction contained in

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*Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

[1]The taxpayers on the 1977 return are William H. Kinsey and the Estate of Irene S. Kinsey, deceased. Mr. Kinsey alone is the taxpayer on the 1978 return. For simplicity's sake, plaintiffs will be referred to collectively as the "taxpayers."

the Form 872-A executed by the parties.[2] The Tax Court held that the statutory notice of deficiency for 1977 was timely issued within the period of the Form 872-A waiver of the statute of limitations for assessment and that the adjustments giving rise to the notice of deficiency for 1977 were within the scope of the special limitation contained therein. We affirm.

FACTUAL BACKGROUND

Taxpayers timely filed a 1977 federal income tax return, claiming a $58,408 loss. This figure represented their distributable share of the loss of Beech Mountain, Ltd. ("Beech Mountain"), in which taxpayers were limited partners. Beech Mountain typically invested in "straddles," in which a

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[2]The parties have stipulated that the resolution of the issues regarding the 1977 return will govern the 1978 return as well. They have also stipulated to the amounts of the deficiencies involved for each tax year.

taxpayer entered into a pair of futures contracts to deliver or to take delivery of a specified quantity of a commodity (in this case, government securities). Through staggered deliveries, the taxpayer attempted to take tax losses in the first year, while deferring gains until the second.

On October 4, 1980, during the time their 1978 return was being audited, the taxpayers were informed by the Service that Beech Mountain was under examination and that the investigation could affect their 1977 return. The taxpayers were asked to execute consent forms extending the statute of limitations for assessment of 1977 taxes. In March, 1981, the taxpayers and the Service executed a Form 872, Consent to Extend the Time to Assess Tax ("Form 872"), which extended until April 15, 1982 the period during which the Service could

assess federal income tax due on their 1977 return.

In February, 1982, taxpayers and the Service executed a Form 872-A, Special Consent to Extend the Time to Assess Tax ("Form 872-A," also called an "open-ended waiver"), which indefinitely extended the deadline by which the Service could assess any federal income tax due on the 1977 return. The Form 872-A also contained a special, typed-in limitation, as follows:

> The amount of any deficiency assessment is to be limited to that resulting from any adjustment to: (a) the taxpayer's distributive share of any item of income, gain, loss, deduction, or credit of, or distribution from Beech Mountain Ltd.; (b) the tax basis of the taxpayer's interest in the aforementioned partnership or organization treated by the taxpayers as a partnership; and, (c) any gain or loss (or the character or timing thereof) realized upon the sale or exchange, abandonment, or other disposition of taxpayer's interest in such partnership or organization treated by the taxpayer as a partnership; including any

consequential changes to other items based on such adjustment.

On March 31, 1982, the Service sent the taxpayers a letter ("30-day letter") and a preliminary examination report, which suggested elimination of both the gain and loss reported by the partnership on the Treasury bill straddle and disallowed the deductions claimed for the taxpayers' distributive share of the partnership losses. The letter notified the taxpayers of the examiner's findings, asked them to sign and return an agreement to those findings and informed them that, in the event they did not accept the findings, they had 30 days to request an Appeals Office review. The letter further stated: "If we do not hear from you within 30 days, we will have to process your case on the basis of the adjustments shown in the

examination report." The taxpayers did not reply.

On May 6, 1982, the Service sent the taxpayers another letter ("10-day letter"), again accompanied by a partial copy of the preliminary examination report. This letter stated, in part: "If we don't hear from you within 10 days, we will have to process your case on the basis of the adjustments shown in the examination report." Again, the taxpayers did not reply.

On March 14, 1983, the Service issued notices of deficiency for 1977 to the taxpayers. In the notices, the Commissioner disallowed deductions for the taxpayers' distributive share of the losses incurred by Beech Mountain on Treasury bill transactions, but included in their gross income their distributive share of the gain incurred on the transactions in those

years. Taxpayers never sent a Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax ("Form 872-T"), to the Service prior to the issuance of the notices of deficiency.

STANDARD OF REVIEW

"We review decisions of the Tax Court on the same basis as District Court decisions in civil bench trials." Roszkos v. Commissioner, 850 F.2d 514, 516 No. 87-7316, slip op. at 7294 (9th Cir. 1988) (citation omitted). On this appeal, involving the issues of when and how a Form 872-A waiver was terminated and the scope of that waiver, the decision is subject to de novo review. Id.

DISCUSSION

I. WHETHER THE DEFICIENCY NOTICE WAS TIMELY

[1] Before an asserted deficiency in tax payments can be assessed, a deficiency

notice must first issue. Internal Revenue Code of 1954, as amended ("I.R.C.") § 6213(a). The notice of deficiency (also called a "90-day letter") gives the taxpayer 90 days to file a petition with the Tax Court for redetermination of the deficiency or to pay the tax (and, if desired, claim a refund). Generally, the statute of limitations for assessing a tax deficiency expires three years after a timely return is filed. I.R.C. § 650(a). Thus, the statute of limitations for assessing the taxpayers' 1977 liability would normally have expired on April 15, 1981. The three-year period may, however, be extended prior to the expiration of the normal period by the taxpayer's written agreement to waive the statute of limitations. I.R.C. § 6501(c)(4). Here, by executing Form 872 in March of 1981, the taxpayers extended the statute of

limitations until April 15, 1982. In February, 1982, they extended the period indefinitely by executing Form 872-A. The timeliness of the 1977 notices of deficiency depends on when the Form 872-A extension terminated.

Form 872-A clearly indicates on its face that the indefinite extension of the statute of limitations terminates on the 90th day following one of three events: (1) the receipt by the I.R.S. of a Form 872-T; (2) the I.R.S.'s mailing a Form 872-T to the taxpayer; or (3) the I.R.S.'s mailing a deficiency notice. Acknowledging that they did not attempt to terminate the indefinite extension by sending the Service a Form 872-T, the taxpayers argue that they were not required to do so since there was an implied "mutual assent" between the I.R.S. and the taxpayers that any timely notice of

deficiency must be issued within 120 days after March 31, 1982, the date the 30-day letter was mailed. The taxpayers reach this conclusion by reasoning that the 30-day letter implied that, if they did not appeal, a deficiency notice would be issued at the expiration of the 30-day period. They further contend that their failure to respond to the letter within the allotted period completed the "agreement" that deficiency notices would be issued at the end of the 30-day period and that, by the terms of Form 872-A, termination of the period of consent would occur 90 days later. The taxpayers then conclude that, since the notices of deficiency (which were not issued until March 14, 1983) were not issued within that time period, the notices are void as untimely. The taxpayers support this argument by pointing to the statement in the 30-day letter that, "If we

do not hear from you within 30 days, we will have to process your case on the basis of the adjustments shown in the examination report." They maintain that the "process" to which the letter refers is the normal process which would have proceeded a few years earlier had the waivers not been executed. They further argue that, under various I.R.S. regulations and publications,[3] this process includes the issuance of a deficiency notice upon the expiration of the 30-day period assuming that the taxpayer has not responded to the letter. Finally, the taxpayers claim that because Form 872-A contained an agreed-upon 90-day limit on issuance of a deficiency

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[3]The taxpayers cite, e.g., Federal Tax Regulations § 601.105(f) (use of Form 9872 suggested "to avoid interruption of the established procedure"); § 601.105(d)(1)(iv) (statutory notice of deficiency will issue if 30-day letter not responded to); I.R.S. Pub. 556 (flow chart of appeal procedure).

notice after termination, the Service had only 90 days after the end of the 30-day period in which to issue the notice.

All of these arguments are meritless. First, as noted above, Form 872-A expressly provides for three ways in which consent can be terminated. A taxpayer's failure to contact the I.R.S. within the 30-day period following the mailing of the 30-day letter (the implied "mutual assent" argument) does not comply with any of them. The Tax Court has several times held that the three means listed in Form 872-A are the exclusive means of termination. E.g., Grunwald v. Commissioner, 86 T.C. 85 (1986) (letter sent by I.R.S. ineffective to terminate Form 872-A); Myers v. Commissioner, T.C. Memo. 1986-518, 512 TCM (CCH) 43,447 (letter from taxpayer's attorney to I.R.S. ineffective to terminate Form 872-A). In

addition, Section 4 of Revenue Procedure 79-22, 1979-1 C.B. 563, states:

> .03 Written notification to the Internal Revenue Service from taxpayer(s) of an election to terminate Form 872-A is to be made using Form 872-T.
>
> * * * * * * * * * * *
>
> .04 Steps taken to terminate Forms 872-A by the Service or the taxpayer(s) other than by using Forms 872-T (e.g., by letter or orally) will not terminate Form 872-A.

This Court has stated, in dicta, that requests for termination of the consent given in Form 872-A may be sufficient to terminate if they are clear and specific, even if they do not comply with the requirement that a taxpayer use Form 872-T. Tapper v. Commissioner, 766 F.2d 401, 404 (9th Cir. 1985). However, the Tax Court subsequently disagreed with that notion, holding in Roberson v. Commissioner, ¶ 86-520 P-H Memo T.C. at 2392 (1986), that

the Tapper dicta does not stand for the proposition that a letter containing sufficient information and directed to the proper department is sufficient to terminate a Form 872-A extension and that Grunwald was dispositive of the issue. It is unnecessary for us to rule on the Tapper dicta, because the taxpayers here do not contend that they made a clear and specific request for termination.

Even if we were to agree with Tapper that the use of Form 872-T is not necessary as long as a clear and specific request for termination is provided, the silence maintained by the taxpayers was neither a clear nor a specific indication of an intent to terminate. In addition, silence does not serve the principal purposes for which Form 872-T is designed, namely to inform the Service: (1) of the intent to terminate the period of limitations on

assessment; (2) of the kind of tax involved; and (3) of the relevant tax periods. Grunwald, 86 T.C. at 89. Since silence is not an acceptable alternative to use of the Form 872-T and since neither the taxpayers nor the Service executed and mailed a Form 872-T, the extension could terminate only by the mailing of a statutory notice of deficiency. That notice was mailed on March 14, 1983. Thus, by the terms of the agreement, the taxpayers' consent to waive the statute of limitations terminated 90 days after March 14, 1983, and the deficiency notices were timely issued.

Second, even if it were possible to terminate a Form 872-A consent by "mutual assent," there is no indication that there was any mutual assent between the taxpayers and the Service that a notice of deficiency would issue on any specific date. The mere

representation in the 30-day letter that, if the taxpayers did not respond within 30 days, the Service would "process" their case is in no way a promise to issue a deficiency notice within any particular period. Although, as the Service acknowledges, "it is likely that a notice of deficiency would ultimately issue when the Service processes a case" (Appellee's Br. at 11), the letter itself did not promise that a deficiency notice would be sent by any particular date, nor did it indicate that the 90-day period referred to in Form 872-A would begin running at the end of the 30 days. Additionally, the Service was not required by statute to issue a notice of deficiency prior to any particular date, as long as it was done sometime within the limitations period or a valid extension thereof. I.R.C. §§ 6501(a), 6501(c)(4).

Finally, policy considerations support a requirement that a Form 872-A waiver can be terminated by a taxpayer only by use of a Form 872-T. As Tapper noted, "The I.R.S. must use forms of general application because it receives millions of communications from taxpayers each year." 766 F.2d at 404. And, as Grunwald stated, "The very purpose expected to be served by Form 872-T would be frustrated were the parties free to indulge themselves in whatever form of termination might strike their fancy, regardless of the degree of informality chosen." 86 T.C. at 89.

In sum, the Tax Court correctly ruled that the deficiency notices were timely.

II. WHETHER THE DEFICIENCY IS WITHIN THE SPECIAL LIMITATION

[2] The Tax Court correctly rejected the taxpayers' contention that the deficiency determination is not within the

special restriction on the consent provided by Form 872-A. The restriction allows for the assessment of any deficiency resulting from any adjustment to the taxpayers' "distributive share of any item of income, gain, loss, deduction or credit of" Beech Mountain. The deficiency of $45,495 stems from ascertainment that the taxpayers should have reported income of $15,280 on their 1977 tax return, rather than a loss of $58,408 as their distributable share of Beech Mountain's taxable income or loss. Clearly, the deficiency determination is attributable to the taxpayers' distributive share of income and loss, which are items listed in the restriction contained in the Form 872-A.

The taxpayers argue that the Service's failure to net the partnership gains against its losses on the Treasury Bill transactions for 1977 in making its

determination was so "irrational" that it could not be an accurate determination of their distributive share of Beech Mountain's taxable income or loss. As the Tax Court noted, however, even if the determination that the taxpayers should have reported income of $15,280 on the 1977 return, rather than the reported loss of $58,408, is, in fact, "irrational," it is still a determination of the taxpayers' distributive share and, therefore, within the bounds of the Form 872-A limitation. The taxpayers are attempting to argue the merits of their tax liability, an issue which was not properly before the Tax Court. The Tax Court, therefore, correctly ruled only on the issue of whether the Form 872-A limitation encompassed any determination involving distributive share of income and loss, an issue which is

easily answered by merely looking at the Form 872-A executed by the parties.

The judgment of the Tax court is AFFIRMED.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| WILLIAM H. KINSEY, et al., Plaintiffs-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Defendant-Appellee. | NO. 87-7237<br>T.C. No. 15099-83<br>ORDER<br>Filed Nov. 18, 1988 Cathy A. Catterson, Clerk U.S. Court of Appeals |

Before: GOODWIN, Chief Circuit Judge, ALARCON, Circuit Judge, and TASHIMA,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

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*Honorable A. Wallace Tashima, United States District Judge, Central District of California, sitting by designation.

EXHIBIT "C"

T.C. Memo. 1987-92

UNITED STATES TAX COURT

WILLIAM H. KINSEY, WILLIAM H. KINSEY AND DELPHINE KINSEY, & ESTATE OF IRENE S. KINSEY, DECEASED, WILLIAM H. KINSEY, EXECUTOR, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 15099-83

Filed February 17, 1987.

William H. Kinsey, pro se.

Gerald W. Douglas, for the respondent.

MEMORANDUM OPINION

FAY, Judge: Respondent determined deficiencies in petitioners' Federal income tax for the years and the amounts as set forth below:

| PETITIONERS | YEAR | AMOUNT |
|---|---|---|
| William H. Kinsey & Est. of Irene S. Kinsey, Deceased, William H. Kinsey, Executor | 1977 | $45,495.00 |

| | | |
|---|---|---|
| William H. Kinsey | 1978 | $67,254.00 |
| William H. Kinsey and Delphine Kinsey | 1979 | $66,036.00 |

The parties have resolved nearly all of the issues and have stipulated that the only remaining issues are whether the deficiency notices for the calendar year 1977 were timely issued and whether the deficiency determined in the 1977 deficiency notices was within the restriction contained in the Form 872-A executed by the parties.[1]

This case has been submitted under

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[1]The parties have stipulated (1) that should this Court hold that the 1977 deficiency notices were timely and that the deficiency determined therein was within the scope of the restriction contained in the Form 872-A, the deficiency for 1977 is $23,364; (2) that "petitioners agree to accept respondent's decision concerning appropriate application of this Court's determination for 1977" as to whether petitioner William H. Kinsey was overassessed $775 for 1978; and (3) that the deficiency for 1979 is $9,450.

Rule 122.[2] All of the facts have been stipulated and are found accordingly.

For the 1977 taxable year, William H. Kinsey and the estate of his deceased wife, Estate of Irene S. Kinsey, Deceased, William H. Kinsey, Executor (hereinafter the "Irene S. Kinsey Estate"), are the petitioners. For the 1978 taxable year, William H. Kinsey alone is the petitioner. On September 29, 1979, William H. Kinsey and Delphine Kinsey were married. For the 1979 taxable year, they are the petitioners. William H. Kinsey and Delphine Kinsey resided in Portland, Oregon at the time the petition herein was filed. Since the issues to be resolved relate solely to the 1977 taxable year, our

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[2]All Rule references are to the Tax Court Rules of Practice and Procedure. All section references are to the Internal Revenue Code of 1954, as amended and in effect during the years in issue.

references to "petitioners," unless otherwise specifically noted, will be to William H. Kinsey and the Irene S. Kinsey Estate.

Petitioners timely filed (without extensions) a 1977 joint Federal income tax return (hereinafter the "1977 return"). Claimed on the 1977 return was a $58,408 loss, representing petitioner William H. Kinsey's distributable share of the loss of Beech Mountain, Ltd. (hereinafter "Beech Mountain"), a partnership in which he was a limited partner.

In March of 1981, petitioners and respondent executed a Form 872, Consent to Extend the Time to Assess Tax (hereinafter "Form 872"). The Form 872 extended the period in which respondent could assess Federal income tax due on the 1977 return until April 15, 1982.

In February of 1982, petitioners and respondent executed a Form 872-A, Special Consent to Extend the Time to Assess Tax (hereinafter "Form 872-A"). The Form 872-A indefinitely extended the period in which respondent could assess Federal income tax due on the 1977 return. The indefinite extension terminated, as clearly indicated in the Form 872-A, on the 90th day following the receipt by respondent o[ a Form 872-T Notice of Termination of Special Consent to Extend the Time to Assess Tax (hereinafter "Form 872-T"), the mailing by respondent of a Form 872-T, or the mailing by respondent of a deficiency notice.[3] The

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[3]Form 872-A provides in relevant part as follows:

> (1) The amount(s) of any Federal Income tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1977 may be assessed on or before the
>
> (continued...)

following typed restriction appears on the face of the Form 872-A:

> The amount of any deficiency assessment is to be limited to that resulting from any adjustment to: (a) the taxpayer's distributive share of any item of income, gain, loss, deduction, or credit of, or distribution from Beech Mountain Ltd.; (b) the tax basis of the taxpayer's interest in the aforementioned partnership or organization treated by the taxpayers as a partnership; and, (c) any gain or loss (or the character or timing

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[3](...continued)
90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s): except that if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will end 60 days after the period during which the making of an assessment was prohibited.

> thereof) realized upon the sale or exchange, abandonment, or other disposition of taxpayer's interest in such partnership or organization treated by the taxpayer as a partnership; including any consequential changes to other items based on such adjustment.

On March 31, 1982, respondent sent to petitioner a letter (hereinafter "30 day letter") and a preliminary examination report. The letter stated in part: "[i]f we do not hear from you within 30 days, we will have to process your case on the basis of the adjustments shown in the examination report." Petitioners did not reply.

On May 6, 1982, respondent sent petitioners a letter (hereinafter "10 day letter") stating in part:

> Some time ago we sent you a report explaining why we believe your tax liability should be adjusted. . . . [W]e have no record of a reply. If we don't hear from you within 10 days, we will have to process your case on the basis of the adjustments shown in the examination report.

Attached to the 10 day letter was a partial copy of the preliminary examination report. Petitioners again did not reply.

On March 14, 1983, respondent issued separate deficiency notices to petitioners determining an income tax deficiency for the 1977 taxable year in the amount of $45,495. Other than the names of the taxpayers, the deficiency notices with respect to the 1977 calendar year are identical.[4] The deficiency determined by respondent is attributable to respondent's determination that petitioners should have reported $15,280 of income rather than a $58,408 loss as petitioner William H. Kinsey's distributable share of Beech Mountain's taxable income or loss.

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[4]The deficiency notice issued to petitioner William H. Kinsey also determined deficiencies for the 1978 calendar year.

The first issue we must decide is whether the 1977 deficiency notices were timely issued. A deficiency notice is timely if issued prior to the expiration of the period during which respondent can assess the tax deficiency. Morrison v. Commissioner, 11 T.C. 696, 704 (1948).[5] Generally, respondent is prohibited from assessing a tax deficiency more than three years after the due date of a timely filed return. Section 6501(a). The general three year period may be extended by written agreement entered into prior to expiration of the period during which respondent could assess the tax deficiency. Section 6501(c)(4).

Petitioners and respondent extended the general three year period to assess a

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[5]See also Scheuerman v. Commissioner, T.C. Memo. 1984-160; Elden v. Commissioner, T.C. Memo. 1982-71; and Price v. Commissioner, T.C. Memo. 1981-693.

tax deficiency with respect to the 1977 return by executing the Form 872 and the Form 872-A. Both parties acknowledge the legal efficacy of these documents. The dispute turns on when the Form 872-A was terminated.

A Form 872-A, as clearly indicated in the body of the agreement, terminates on the 90th day following the receipt by respondent of a Form 872-T, the mailing by respondent of a Form 872-T, or the mailing by respondent of a deficiency notice.[6] Respondent contends that the Form 872-A was terminated 90 days after March 14, 1983, the date of the mailing of the deficiency notices. As such, the deficiency notices

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[6]Where a deficiency notice is the terminating agent, the period in which respondent can assess extends beyond the effective date of the termination of the Form 872-A. See Section 6503(a)(1). See also the text of Form 872-A, note 3, supra.

would be timely. Petitioner contends that the Form 872-A was terminated 120 days after March 31, 1982, the date respondent mailed the 30 day letter. Upon their failure to respond to the thirty day letter within the thirty day period, petitioners reason that they tacitly agreed to the issuance of deficiency notices, that deficiency notices should have been issued, and that the Form 872-A terminated on the 90th day following the date on which the deficiency notices should have been issued. Based on the same reasoning, petitioner's contend that the Form 872-A was terminated 100 days after May 6, 1982, the date respondent mailed the ten day letter. Under either of petitioner's contentions, the deficiency notices would be untimely.

This Court has held that a Form 872-A of this type may be terminated only in the three manners clearly described and listed

in the body of the agreement and that letters, sent by respondent or the taxpayers, are ineffective to terminate a Form 872-A. See Grunwald v. Commissioner, 86 T.C. 85 (1986); Myers v. Commissioner, T.C. Memo. 1986-518; Kloppenberg and Co. v. Commissioner, T.C. Memo. 1986-325; and Jordan v. Commissioner, T.C. Memo. 1986-124. Petitioners attempt to bring themselves outside the scope of these opinions by arguing that they and respondent reached an agreement that respondent would issue deficiency notices on particular dates. Assuming, arguendo, that petitioners and respondent did reach such an agreement, a Form 872-A is terminated on the 90th day following the issuance o[ a deficiency notice, not on the 90th day following an agreed date for the issuance of a deficiency notice. In any event, we do not find that petitioners and

respondent made such an agreement. The thirty day letter and the ten day letter merely state that upon petitioners' failure to reply, respondent will "process" their case. Petitioners did not reply. At best petitioners and respondent agreed that respondent would "process" petitioners' case, which, we note, respondent would have done in the absence of the alleged agreement. Although it is likely "process" as used in this context would ultimately result in the issuance of deficiency notices, in no way can the thirty day letter, the ten day letter, or the use of the term "process" in such letters be interpreted as an offer by respondent to mail deficiency notices on specific dates. Accordingly, we hold that neither the thirty day letter nor the ten day letter had any effect on the termination of the Form 872-A. As contended by respondent,

the Form 872-A terminated on the 90th day following March 14, 1983, the date of the mailing of the deficiency notices. The deficiency notices were timely.

The second issue is whether the deficiency determined by respondent in the 1977 deficiency notices was within the restriction contained in the Form 872-A. The restriction, which is quoted in full above, allows for the assessment of any deficiency resulting from any adjustment to petitioner William H. Kinsey's distributable share of any item of income, gain, loss, deduction, or credit of Beech Mountain. The deficiency determined by respondent is attributable to respondent's determination that petitioners should have reported on their 1977 return income of $15,280, rather than a loss of $58,408, as petitioner William H. Kinsey's distributable share of Beech Mountain's

taxable income or loss. Since the deficiency determined by respondent is attributable to adjustments to items listed in the restriction, we hold that the deficiency so determined is clearly within the restriction contained in the Form 872-A.[7]

Because the parties have agreed that respondent will decide, on the basis of our opinion, whether petitioner William H. Kinsey was overassessed $775 for the 1978 taxable year, see n.1, supra, and to reflect the foregoing,

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[7]Petitioners argue that respondent's determination was so "irrational" that it was not a determination of petitioner William H. Kinsey's distributable share of Beech Mountain's taxable income or loss. Assuming, arguendo, that respondent's determination was irrational, it would nonetheless be an determination or petitioner William H. Kinsey's distributable share of Beech Mountain's taxable income or loss, and the deficiency attributable thereto would clearly be within the restriction contained in the Form 872-A.

Decision will be entered under Rule 155 for the 1978 taxable year.

Decision will be entered for the respondent for the 1977 and 1979 taxable years.

APPENDIX "D"

UNITED STATES TAX COURT

| | | |
|---|---|---|
| WILLIAM H. KINSEY, WILLIAM H. KINSEY and DELPHINE KINSEY and ESTATE OF IRENE S. KINSEY, DECEASED, WILLIAM H. KINSEY, EXECUTOR, | ) | |
| Petitioners, | ) | |
| v. | ) | |
| COMMISSIONER OF INTERNAL REVENUE. | ) | Docket No. 15099-83 |
| Respondent. | ) | |

DECISION

Pursuant to the opinion of the Court filed February 17, 1987, and the stipulation of the parties filed in the above-entitled case, and incorporating herein the facts stipulated by the parties as the findings of the Court, it is

ORDERED and DECIDIED [sic]: That there are deficiencies in income taxes due from the petitioners for the taxable years 1977 and 1979 in the amounts of $23.364.00 and $9.450.00, respectively; and

That there is an overpayment in income tax for the taxable year 1978 in the amount of $775.00, which amount was paid on

April 15, 1979. and for which amount a claim for refund could have been filed, under the provisions of I.R.C. §6511(c) on March 14, 1983, the date of the mailing of the notice of deficiency.

(SIGNED) Wm. M. Fay

Judge

Entered: MAR 23, 1987

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APPENDIX "E"


Examination of income tax return
Preliminary notice 30 Day Letter
Protest (when required)
Appeals Office
If you do not respond or the 30 day period expires, then
Notice of Deficiency 90 Day Letter

From IRS Publication 556